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No. 82-2103

In The

Supreme Court of the United States

October Term, 1982

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UNIVERSAL RESTAURANTS, INC.,

Petitioner,

vs.

LAURA FELLOWS,

Respondent.

—o—

RESPONDENT'S OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

—o—

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COMES NOW Respondent, Laura Fellows, and files this, her Opposition to Petitioner's Petition for a Writ of Certiorari, and would show as follows:

QUESTIONS PRESENTED

Respondent believes that the question presented is:

> "Is the filing of an EEOC charge which specifically alleges classwide discrimination a jurisdictional prerequisite to the maintenance of a class action employment discrimination suit?"

If the answer to this question is in the negative, then the Court below did not err.

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RESPONSE TO JURISDICTIONAL STATEMENT

Although jurisdiction has been technically shown by Petitioner Universal Restaurants under 28 U. S. C. § 1254 (1), it is Respondent's position that Petitioner has not shown the slightest reason for this Court to exercise its discretion to grant certiorari. Petitioner has not argued that the decision of the Fifth Circuit is in conflict with the decison of another federal court of appeals on the same

matter, or that it is in direct conflict with any decision of this Court. Petitioner mentions that the Fifth Circuit's reasoning is allegedly inconsistent with the decisions of this Court regarding standards for determining the nature and extent of employment discrimination, but shows no direct conflict.

Further, Respondent would show that the issue presented to the Court is not yet ripe for consideration. The determination of the Fifth Circuit that the case should not be dismissed on jurisdictional grounds is not dispositive of the class status of the suit. Respondent still faces a certification hearing on the merits. If this case acquires class status and goes on to judgment, then Petitioner might correctly request this Court to consider granting certiorari. As it is, the Court should be guided by the long established rule that "this Court should not issue a writ of certiorari to review a decree of the circuit court of appeals on appeal from an interlocutory order, unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause. *American Construction Co. v. Jacksonville, T & K R. Co.*, 148 U. S. 372, 384 (1892). *See also Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U. S. 251 (1916); (lack of finality "of itself alone furnished sufficient ground for the denial"); *Brotherhood of Locomotive Firemen v. Bangor & Aroostook RR*, 389 U. S. 327 (1967) (because the Court of Appeals remanded the case, it is not yet ripe for review by this Court).

STATEMENT OF THE CASE

Respondent cannot agree to the statement of the case as drawn up by Petitioner. Therefore, Respondent would submit the following as the statement of the case:

Laura Fellows, (Respondent hereinafter), is a female citizen of the United States. During January of 1980 she applied for positions as a waitress or captain at four restaurants owned and operated by the Petitioner, Universal Restaurants, (Petitioner hereinafter). Although denied the positions she sought, she was ultimately hired by Petitioner as a wine steward, and later discharged from that position.

On March 12, 1980, Respondent filed a charge of discrimination with the Equal Employment Opportunity Commission. In that charge she alleged that she had suffered discrimination in several ways, including:

1. By not being hired as a waiter or captain because of sex;

2. By being paid less than similarly employed males because of sex;

3. By being discharged because of her sex.

After receipt of the charge, the EEOC instituted an investigation of the charge. That investigation included not only requests for information related solely to Respondent, but also two separate requests for information concerning other applicants, and the sexual makeup of Petitioner's work force. The Commission's request for information concerning other female applicants was denied by Petitioner. Since the EEOC did not issue a sub-

poena for the requested information, this class investigation was effectively derailed by Petitioner's refusal to supply information.

On May 1, 1980, a fact finding conference was held by the EEOC which was attended by both parties and their attorneys. At that time, Respondent's allegations were discussed but no resolution of the dispute was reached. After the conclusion of the conference, the Commission once again sought information concerning other applicants. This request was also refused by Petitioner. Therefore, it is clear that the Commission's repeated efforts to conduct a class-type investigation were deliberately thwarted by Petitioner.

After the expiration of 180 days from the date of the charge, the agency, according to its rules, issued a notice of right to sue. Shortly thereafter, this suit was filed in federal district court, alleging that Petitioner had discriminated against Respondent and a Rule 23(b) (2) class of similarly situated females. It was alleged as to the class, *inter alia,* that Petitioner had failed to hire females on the same basis as males. Thus, Respondent's own allegation of hiring discrimination was precisely typical of that of the class.

Petitioner responded to Respondent's original complaint by filing a motion seeking, among other things, the dismissal of all class allegations. There, Petitioner argued that since Respondent's EEOC charge made no express class allegations, and because the EEOC had not investigated or conciliated on a class basis, the court lacked jurisdiction over the class aspects of the case. After extensive briefing and argument from counsel, the court

granted Petitioner's motion saying that where the charge was one devoid of class allegations and in which the EEOC had made no class investigation, the district court lacked jurisdiction to entertain class claims based on that charge. By doing so the court necessarily held that either class allegations in the charge, or a class-type investigation by the EEOC is a jurisdictional prerequisite to the maintenance of a class action under Title VII.

Respondent then sought discretionary interlocutory review in the United States Court of Appeals for the Fifth Circuit pursuant to the Interlocutory Appeals Act, 28 U. S. C. § 1291(b). The Fifth Circuit agreed to review the order, and after hearing, reversed and remanded the District Court's dismissal for further proceedings. The appeals court based its reversal upon findings that (1) the jurisdictional basis for dismissal was improvident because the class claims were not wholly insubstantial or frivolous, and (2) that on the merits, the class claims were sufficiently "like or related to" Fellows' individual claims so as to permit them to proceed. From this adverse judgment and opinion, Petitioner seeks relief from this Court.

REASONS FOR DENYING THE WRIT

In its petition Universal sets forth three reasons why the Court should grant a Writ in this case. They will be discussed below.

A. Petitioner's First Reason

Petitioner's First Reason why the Supreme Court should grant certiorari in this case is merely a rehash of

arguments made and rejected below. They contend that Respondent's judicial complaint was not "like or related to" her EEOC charge as required by the leading opinion of the Fifth Circuit in *Sanchez v. Standard Brands, Inc.*, 431 F. 2d 455 (5th Cir. 1970). For Petitioner to be satisfied with an EEOC charge as a predicate for a class action, the charging party would have to make specific charges of classwide discrimination at the EEOC. Respondent submits that such a burden is too onerous to place upon an unlettered Title VII Plaintiff.

While Petitioner attempts to deal with this issue in terms of broad generalizations it would be well to consider the case actually before the Court. By doing so Petitioner's arguments can be seen for what they are. For example, defendant cites a number of cases including *Hubbard v. Rubbermaid, Inc.*, 436 F.Supp 1184 (D.Md. 1977) and *Jiron v. Sperry Rand Corp.*, 423 F.Supp. 155 (D. Utah 1975) in trying to argue that the Circuit Court's opinion did harm to Petitioner under some notion of due process. Unable to contend that they are entitled to conciliate a plaintiff's charge Respondent contends that it has a right to notice of the scope of any future litigation. The source of such a right is undisclosed. Clearly there is no general due process right to notice prior to the filing of a civil suit. Equally clear the administrative procedures of Title VII were established to obtain compliance with the law, not to protect defendants. Therefore, it is nonsense for Petitioner to argue as though it had a due process right in the full utilization of EEOC procedures. *See eg., Beverly v. Lone Star Lead Const. Corp.*, 437 F.2d 1136 (5th Cir. 1971).

B. Petitioner's Second Reason

For its Second Reason why the Court should grant certiorari Universal claims that the opinion of the Fifth Circuit is contrary to those of the Supreme Court. Nothing could be further from the truth since the opinion of the Fifth Circuit is consistent with several opinions of the Supreme Court.

The issue before the Circuit Court was whether a person who filed a charge before the EEOC complaining of personal harm flowing from a class based animus could thereafter bring a class action suit. In answering in the affirmative, the Court gave weight to the opinions of the Supreme Court holding that discrimination based on race or sex is inherently class discrimination. *See eg. Zipes v. Trans World Airlines, Inc.,* 455 U. S. 385, 102 S.Ct. 1127, 71 L.Ed.2d 234 (1982). Since, in the view of the Circuit, an individual's complaint of sex discrimination is inherently a complaint of class discriminaton, it naturally follows that such a charging party can allege a class action in Court.

Petitioner's citation of *General Telephone Co. of the Southwest v. Falcon,* 457 U. S. 147 (1982), does not advance its position. That case deals not with the necessary relationship between an EEOC charge and suit, but with the evidentiary requirements for class certification. It merely holds that a would-be class representative has the burden of proving the Rule 23 requirements prior to certification. This is a burden which Respondent will gladly shoulder. She has, however, been prevented from doing so thus far by an improper dismissal of class claims.

Similarly, the teachings of *International Brotherhood of Teamsters v. United States*, 431 U. S. 324 (1977) casts no doubt on the propriety of the ruling below. There the Court held that one must prove routine discrimination as opposed to isolated or sporadic incidents in order to prevail on the merits of a pattern and practice suit. This decision concerning the burden of proof at a class action trial does not indicate that a charging party must have evidence of classwide discrimination at the time an EEOC charge is filed. Indeed, it would be virtually impossible for any charging party to have such evidence when a charge is filed.

In summary, the decision of the Fifth Circuit is consistent with those of the Supreme Court and the petition should therefore be denied.

C. Petitioner's Third Reason

Finally, Petitioner argues that the decision of the Fifth Circuit presents employers with the problem of "trial by ambush." Without regard to the general merit of this argument, it does not apply to this case. The Circuit correctly found that Petitioner had received notice in at least two ways of the class implications of Respondent's charge. First, the Circuit correctly found that Respondent's attorney notified Petitioner shortly after the charge was filed that a class action law suit was being contemplated. Secondly, the EEOC in investigating Respondent's charge twice sought classwide information from Petitioner. Therefore, this Petitioner was placed on notice of the full implications of Respondent's charge.

Petitioner also argues that the Fifth Circuit's holding will foster an unwarranted proliferation of Title VII class

actions. While the elimination of frivolous class claims is a laudable goal, the Petitioner's approach would eliminate meritorious class actions along with the frivolous.[1] This is clearly contrary to the well-established policy in favor of class litigation to vindicate the remedial purposes of the act. *Albemarle Paper Co. v. Moody,* 422 U. S. 405 (1975).

Respondent would show that the better approach is the one currently being used by the Fifth Circuit. The Court will look at each EEOC charge and determine if the court claim is "like or related to" the initial charge so as to put the employer on notice of possible class claims. The adoption of a requirement that the plaintiff must specifically allege class discrimination in his EEOC charge in order to later be able to claim class discrimination in his court complaint will seriously prejudice the unsophisticated litigant in his attempt to obtain the full relief accorded him under Title VII, and the governmental policy of eradicating employment discrimination through the use of private attorneys general.

SUMMARY AND CONCLUSION

In conclusion, Petitioner has shown no basis upon which the Court should grant a Writ of Certiorari. The

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[1] Petitioner also urges that no plaintiff is denied his or her day in court. Respondent would urge the reasoning applied in *Oatis v. Crown Zellerbach Corp.,* 398 F.2d 496, 499 (5th Cir. 1968), to show that "to require a multiplicity of separate, identical charges before the EEOC, filed against the same employer, as a prerequisite to relief through resort to the Court would tend to frustrate our system of justice and order."

issues presented are not ripe for adjudication and Petitioner's arguments are without merit. The petition should therefore be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing has been mailed to counsel for defendant on this the — day of July, 1983.

Steven B. Thorpe

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 82-1125

LAURA FELLOWS,
Plaintiff-Appellant,

vs.

UNIVERSAL RESTAURANTS, INC.,
Defendant-Appellee.

Appeal From the United States District Court
For The Northern District of Texas

Entered March 28, 1983

Before WISDOM, RUBIN and TATE, Circuit Judges.

TATE, Circuit Judge:

Pursuant to 28 U. S. C. § 1292(b) certification, the plaintiff Ms. Fellows appeals from an interlocutory order dismissing the class action allegations of her suit against the defendant, her former employer ("Universal"). Her complaint is founded upon employment discrimination against her and other females in violation of Title VII ("Equal Employment Opportunities") of the Civil Rights Act of 1964, 42 U. S. C. §§ 2000e et seq. The district court held that it did not have jurisdiction over the class allegations of Ms. Fellows' complaint because she did not specifically state them in her initial charge of employment discrimination filed with the Equal Employment Opportunity Commission ("the EEOC"), nor had the Commission's administrative investigation included them within its scope. We reverse, finding that a dismissal for lack of jurisdiction is inappropriate because a non-frivolous fed-

eral question was presented that requires the exercise of jurisdiction by the district court, and because the initial charges of discrimination before the EEOC were sufficiently like or related to those asserted by the class action as to support a Title VII cause of action for the class.

The Factual Context

Ms. Fellows, after applying for a position with Universal Restaurants as a waiter or captain, was hired by the restaurant as a wine steward. Shortly thereafter, she was discharged from that position. Without counsel she filed a charge with the EEOC as is provided for under Title VII, 42 U. S. C. § 2000e-5(b), alleging that she had been discriminated against on the basis of sex in her hiring, pay, and discharge.[1] The charge was filed within the delay provided by the statute, *id.*, 2000e-5(e), a prerequisite for subsequent administrative or judicial action.

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[1] Ms. Fellows' charge alleged:

> I believe that I have been discriminated against because of my sex, female, in that:
>
> 1. Phil Varacharo paid the male Wine Steward $40.00 to $50.00 per shift plus a percentage of 2% over $200.00 and I was paid only $3.10 per hour for performing the same duties.
> 2. I performed all of my duties in an outstanding manner, and the discharge by Phil Varacharo was not justified.
> 3. I was the only female employed in the position of Wine Stewardess, and I believe I was paid less and discharged because of my sex, female.
> 4. Phil Varacharo denied my application for positions as a Waitress, and Captain in Marios, Les Saisons, and the Old Warsaw Restaurant owned by the above named employer because of my sex, female.

Pursuant to the Act, 42 U. S. C. § 2000e-5(b), the EEOC instituted an investigation of her charge and began attempts at conciliation between the parties. This investigation included requests for information from Universal relating to Ms. Fellows' employment, and also relating to other applicants and employees of the restaurant. Universal refused to answer the latter questions as beyond the scope of the investigation. The EEOC did not seek compliance from Universal and confined its investigation solely to the claim of individual discrimination.

Shortly after the charge was filed, Ms. Fellows retained counsel, and her attorney sent a letter to Universal stating that if an amicable settlement could not be reached, a class action lawsuit would be filed. Although attempts at conciliation were made, no settlement was obtained.

After failing to process Fellows' charge within 180 days, 42 U. S. C. § 2000e-5(f) (1), the EEOC issued a right-to-sue letter, and she filed this individual and class action suit alleging that Universal had discriminated against herself and other women on the basis of their sex in its recruitment, hiring, promotion, and compensation policies, all of which discriminatory conduct is implicated by Ms. Fellows' charge to the EEOC (at least as having affected her personally). *See* note 1 *supra*. On motion to dismiss by Universal for lack of jurisdiction, submitted with affidavits, the district court dismissed the class aspects of the suit, finding that the presence of either a class allegation in the EEOC charge or a class investigation by the EEOC was a jurisdictional prerequisite to a class action suit under Title VII, and that the conciliation policies

of Title VII would not be served if the initial charge did not by its terms afford an opportunity for the employer to defend against, and the Commission to investigate, class discrimination not specifically complained of by the employee's initial EEOC charge.

Jurisdictional Test: In General

When a party files suit for relief under the United States Constitution or under federal statute, a federal district court may not dismiss the suit on jurisdictional grounds unless the court finds (1) that the federal claim is immaterial and made solely for the purpose of obtaining jurisdiction, or (2) that the federal claim is wholly insubstantial and frivolous. *Bell v. Hood,* 327 U. S. 678, 682-83, 66 S.Ct. 773, 776, 90 L.Ed. 939 (1946); *Miller v. Stanmore,* 636 F.2d 986, 989 (5th Cir. 1981); *Suthoff v. Yazoo County Industrial Development Corporation,* 637 F.2d 337, 339 (5th Cir. 1981), *cert. denied, sub nom Yazoo County Industrial Development Corporation v. Suthoff,* 454 U. S. 1157, 102 S.Ct. 1032, 71 L.Ed. 2d 316 (1982). Jurisdiction "is not defeated by the possibility that the averments might fail to state a cause of action on which the petitioners could actually recover. . . . Whether the complaint states a cause of action on which relief could be granted is a question of law and just as issues of fact it must be decided after and not before the court has assumed jurisdiction over the controversy." *Bell v. Hood, supra,* 327 U. S. at 682, 66 S.Ct. at 776.

Here, Ms. Fellows clearly states a material federal claim of class employment discrimination in violation of a federal statute, Title VII, the sole basis of her suit. Considering the allegations of the complaint as true (as re-

quired for review of a dismissal thereof for lack of jurisdiction, *Miller v. Stanmore, supra,* 636 F.2d at 988), they would show that the defendant Universal discriminates against females as a class in its employment practices, in violation of federal law.

Thus, under *Bell v. Hood, supra,* her claim could be dismissed for lack of jurisdiction only if her federal class claim were wholly insubstantial and frivolous. In determining whether a federal claim meets this criterion, a two-prong test is used,

> a federal question may be insubstantial either (1) because it is obviously without merit, or (2) because it is clearly foreclosed by previous decisions of the Supreme Court.

Miller v. Stanmore, supra, 636 F.2d at 989. We find neither of these criteria for dismissal are here met and, further, that for reasons to be noted the showing made shows sufficient basis for the district court's jurisdiction of the class action under Title VII as to require it to maintain its jurisdiction of this aspect of the suit.

Title VII Action: Cause of Action

The basic two statutory requirements (although these are not necessarily "jurisdictional") for a Title VII suit are (1) the filing of a complaint with the EEOC and (2) the receipt of the statutory notice of right to sue. *See McKee v. McDonnell Douglas Technical Services Co., Inc.,* 700 F.2d 260 (5th Cir. 1983). In contending that the district court lacked jurisdiction of the class action aspects of the suit, the defendant employer contends that the class subject matter of the lawsuit was not made the subject matter of a timely charge before the EEOC, because Ms.

Fellows' initial complaint to the EEOC of sex discrimination related only to herself individually, not to women as a class.

It may well be that gender or "racial discrimination is by definition class discrimination", *General Telephone Company of Southwest v. Falcon*, — U. S. —, —, 102 S.Ct. 2364, 2370-71, 72 L.Ed.2d 740 (1982),[2] and that we could end our jurisdictional inquiry there. *See also Zipes v. Trans World Airlines, Inc.*, 455 U. S. 385, 102 S.Ct. 1127, 71 L.Ed.2d 234 (1982). However, we prefer to rest our ruling upon decisions of this circuit that indicate to us that a class cause of action in this suit may be maintained in district court, despite the circumstance that on its face the initial EEOC charge by the employee literally construed may have manifested only an individual complaint.

In *Sanchez v. Standard Brands, Inc.*, 431 F.2d 455 (5th Cir. 1970), as in the present instance, the employee's initial charge and amended charge to the EEOC only alleged individual acts of discrimination against her on the basis of her sex and national origin. Subsequent to failure of EEOC efforts to secure conciliation and compliance, the employee filed suit for herself individually and for

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[2] In approving this principle in *Falcon* with relation to maintaining class actions, the Court further noted the distinguishable merit issues that relate to maintenance of a Title VII class action:

> We cannot disagree with the proposition underlying the across-the-board rule—that racial discrimination is by definition class discrimination. But the allegation that such discrimination has occurred neither determines whether a class action may be maintained in accordance with [Fed. R.Civ.P.] Rule 23 nor defines the class that may be certified. — U. S. at —, 102 S.Ct. at 2370-71.

others of the class. The district court dismissed for failure to state a claim as to those allegations that went beyond the terms of the employee's initial EEOC charge. In reversing the district court's dismissal, *Sanchez* held that, inter alia, the scope of the employee's cause of action could include not only those charges specifically made before the EEOC but also " 'may encompass any kind of discrimination like or related to allegations contained in the charge' ", 431 F.2d at 466. The court stated: "The 'scope' of the judicial complaint is limited to the 'scope' of the EEOC investigation which can reasonably be expected to grow out of the charge of discrimination." *Id.*

A similar test was applied in *Gamble v. Birmingham Southern Railroad Company,* 514 F.2d 678 (5th Cir. 1975). There, the EEOC charge by black switchmen and the subsequent EEOC investigation had only complained of the denial of promotion opportunities to conductor, but not also of the denial of promotion to higher supervisory positions, as additionally alleged by their suit's complaint. The district court held that, therefore, the latter claim was outside the "permissible scope" of the cause of action based upon the initial EEOC charge and the EEOC investigation. Even though neither the initial charge nor the actual EEOC investigation had included the broadened charge of discrimination asserted by the lawsuit's complaint, we reversed and held that the broadened claim of discrimination was sufficiently "like or related to" the initial charge that an investigation "could reasonably be expected to grow from it," 514 F.2d at 688—although none had in fact—, so that this broader charge of discrimina-

tion was properly asserted as part of the cause of action based upon the initial EEOC complaint. *Id.*[3]

As in *Sanchez,* in *Gamble* we pointed out that the underlying policies of the Title VII Equal Employment Opportunity Act are not served by limiting judicial relief to technical niceties of the language used by an often unlettered or unsophisticated employee in filing his or her initial grievance with the EEOC. In *Gamble,* quoting with approval from a district court opinion, we stated

> [T]he Civil Rights Act is designed to protect those who are least able to protect themselves. Complainants to the EEOC are seldon [represented] by lawyers. To compel the charging party to specifically articulate in a charge filed with the Commission the full panoply of discrimination which he may have suffered may cause the very persons Title VII was designed to protect to lose that protection because they are ignorant of or unable to thoroughly describe the discriminatory practices to which they are subjected.

514 F.2d at 689.

Sanchez and *Gamble,* then, are authority for holding that a cause of action for Title VII employment discrimi-

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[3] The able district court was concerned that the alleged lack of notice of a class basis for the discrimination charges deprived the EEOC of an opportunity to conciliate the class grievances, a preferred mode of resolution. In *Gamble,* we addressed the conciliation issue and found that the conciliation purposes of the act must yield to its more basic purposes to protect persons against employment discrimination, indicating that protecting a merely theoretical right to conciliation (that might not be accepted) by dismissing a subsequent suit, is outweighed by more fundamental purposes of the Act to afford the possibility of administrative and judicial relief to employees who are subject to employment discrimination. *Gamble, supra,* 514 F.2d at 688-89.

nation may be based, not only upon the specific complaints made by the employee's initial EEOC charge, but also upon any kind of discrimination like or related to the charge's allegations, limited only by the scope of the EEOC investigation that could reasonably be expected to grow out of the initial charge of discrimination. Other circuits apply a similar test. *Hicks v. ABT Associates, Inc.*, 572 F.2d 960, 966 (3d Cir. 1978); *McBride v. Delta Airlines, Inc.*, 551 F.2d 113, 115 (6th Cir.) *vacated on other grounds, sub nom. Delta Airlines, Inc. v. McBride*, 434 U. S. 916, 98 S.Ct. 387, 54 L.Ed.2d 273 (1977).

EEOC Complaint as to Individual Discrimination: Basis for Class Action?

The defendant Universal would distinguish *Sanchez* and *Gamble*, insofar as applying to the present facts, because *Gamble's* initial EEOC charge included class complaints (although not all of those additionally allowed to be sued upon) and because, it is suggested (it is not clear from the opinion), *Sanchez* by actual EEOC investigation subsequent to the intial charge extended its investigation of the individual's charge to include class discrimination. As we appreciate Universal's argument, it does not contest that under *Sanchez* and *Gamble* the class action could be properly asserted had the unlawyered employee, Ms. Fellows, checked a "class" complaint box or had she more broadly phrased her charge to include classwide instead of only individual gender discrimination. "[A] class action can be maintained under the Act even though only one member of the class has filed a charge of discrimination." *Sanchez, supra*, 431 F.2d at 631.

We are not persuaded by the argument that the present EEOC charge by Ms. Fellows could not support a subsequent cause of action for a class of women subjected to the same discrimination or to discrimination like or related to those described by the allegations of that initial charge.

In the first place, for instance, among Ms. Fellows' initial charges is that she "was paid less and discharged because of my sex, female", and that her application for various superior positions in the establishment were denied "because of my sex, female." See note 1 *supra*. Had she stated, instead, that "I was paid less because women are paid less," or "my applications for the superior positions were denied because no women were considered for them," her allegations would have been of class as well as of individual discrimination, so as clearly to justify a class action. Given the liberal construction accorded EEOC charges, especially those by unlawyered complainants, we are inclined to believe that the wordings of her actual and of our hypothetical charges could equally be understood to complain of discriminatory employment treatment of all women applicants and employees, as well as of Ms. Fellows herself.

In any event, the allegations of Ms. Fellows' EEOC charge that she was paid less and denied eligibility for most other paying positions in the business, solely because of her female sex, quite clearly meet the *Sanchez-Gamble* test, in our opinion. The scope of Ms. Fellows' judicial complaint could include class action allegations, since EEOC investigation of class discrimination against women could reasonably be expected to grow out of her alle-

gations in her initial EEOC charge. In fact, when the EEOC instigated its investigation by commencing discovery, it directed questions to Universal not only as to Fellows' individual situation, but also as to the makeup of Universal's total work force. That these questions were asked suggests the reasonable possibility of a class investigation, and that Universal refused to answer suggests that Universal was aware of and wished to avoid this possibility. Universal's obduracy in attempting to limit the classwide scope of the EEOC's investigation does not militate against the initial charges having afforded a reasonable expectation that the EEOC's investigation could encompass not only Universal's alleged discrimination against Ms. Fellows but also that against all female applicants and employees.

Likewise, although the EEOC did not attempt to obtain compliance when Universal refused to answer, this failure should not be seen as determinative of the scope of the EEOC investigation that could reasonably be expected to grow out of the charge.

Although the EEOC may compel responses to class-directed questions in situations similar to this one, *Georgia Power Company v. Equal Employment Opportunity Commission,* 412 F.2d 462, 468 (5th Cir. 1969), that Commission (which in this suit has filed an amicus curiae brief in support of the employee's contentions), points out that, due to volume and backlog problems, it has adopted a policy of ordinarily limiting its investigations only to those that directly affect a charging party, but without intending to affect that party's right to relief by civil suit "for all discriminatory practices which are like or related to

those alleged in the charge which might have been uncovered if the Commission had sufficient resources to investigate all charges more extensively." Taking a Charge, [Compliance Procedures] EEOC Compl. Man. [BNA] § 2.1 (e) (May, 1979).

Conclusion

For the foregoing reasons, and in accord with the purposes of Title VII (permitting often-uneducated employees—" 'those who are least able to protect themselves' "—to vindicate their rights before first the EEOC and then the courts, *Gamble, supra,* 514 F.2d at 689), we conclude that a dismissal on jurisdictional grounds was error on the part of the district court. We therefore REVERSE the order dismissing the class aspects of Fellows' suit, and REMAND for further proceedings.

REVERSED AND REMANDED.

APPENDIX B

In The
UNITED STATES DISTRICT COURT
For the Northern District of Texas
Dallas Division

No. CA3-80-1328-F

Laura Fellows,
Plaintiff,

vs.

Universal Restaurants, Inc.,
Defendant.

ORDER AND MEMORANDUM OPINION

This is a Title VII sex discrimination suit brought by Laura Fellows against the Defendant arising out of Ms. Fellows' brief tenure as an employee at the Old Warsaw restaurant. Shortly after she was discharged by the Defendant Ms. Fellows filed discrimination charges against the Defendant with the Equal Employment Opportunity Commission ("EEOC") alleging that

(1) she had been discharged from her position as a wine stewardess because of her sex,

(2) she was paid less than the male wine stewards during her employment tenure because of her sex,

(3) she was denied a position as a waitress and captain in several restaurants owned by the Defendant for which she applied because of her sex.

Ms. Fellows was hired by the Defendant on January 11, 1980. She was discharged on January 23, 1980. On

February 11, 1980, she filled out an EEOC questionnaire. On March 12, 1980, she executed her formal charge of discrimination with the EEOC. Two weeks later, she informed the EEOC that she had retained counsel to aid her in the prosecution of her discrimination charges. On April 23, 1980, the Defendant responded to EEOC requests for information in connection with the EEOC's investigation. In response to two specific questions, set forth below, the Defendant informed the EEOC that the requested information was beyond the scope of Ms. Fellows charge, and accordingly declined to furnish the information:

> Question 03. Submit a list of all vacancies during the period January 1, 1980 to January 31, 1980, for the positions of Waiter/Waitress, Wine Steward/Stewardess, and Captain at Marios, Les Saisons, and the Warsaw Restaurants; include the job description, and job qualifications, both requisite and preferred, for each vacancy.
>
> Answer 03. Respondent feels this inquiry is beyond the scope of Ms. Fellows' charge. Ms. Fellows was hired as a rotating wine steward trainee who claims sex discrimination because of her discharge.
>
> Question 05. Submit a list of all individuals employed in the Warsaw Restaurant, Marios, and Les Saisons as of January 11, 1980. Include name, sex, date of hire, initial job classification and wage rate, and any subsequent job classifications including date and wage changes.
>
> Answer 05. Respondent feels this inquiry is beyond the scope of Ms. Fellows' charge. The Charging Party claims to have been the object of sex discrimination in the position of rotating wine steward trainee, and her factual allegations pertain to employment practices in that department.

With respect to other information requested by the EEOC the Defendant complied with the agency's requests. On May 1, 1980, the EEOC held a fact finding conference at which counsel for both the Plaintiff and Defendant were present, as well as Ms. Fellows. The next day the EEOC issued a supplemental questionnaire to the Defendant seeking to gain additional information with respect to Ms. Fellows' charge. On June 3, 1980, the Defendant responded to that request, providing for the most part all of the information requested. With respect to one of the requests, however, the Defendant declined to provide the information requested:

> 04. Submit a list of all individuals employed in the Les Saisons, Old Warsaw, Arthurs, and Marios Restaurants as of May 1, 1980. Include name, sex.
>
> "In question 04., you have requested a list of all Respondent's employees as of May 1, 1980. We do not understand the significance of that date, nor the need for all these names. If, however, the Commission feels there is a compelling and relevant need for this information, please contact the undersigned for discussion".

On September 20, 1980, the Commission issued a right to sue letter to Ms. Fellows, having failed to process her charge within 180 days. The instant suit was commenced October 3, 1980.

In her complaint Plaintiff alleges that the Defendant discriminated against her on the basis of sex with respect to (1) being denied a position as waitress or captain, (2) being assigned the position of wine steward, and (3) being discharged. In addition, Plaintiff brings this action as to herself and on behalf of a class of females alleging

that the Defendant maintains discriminatory policies and practices in the following respects:

(1) Defendant fails to recruit, hire, and promote females on the same basis as males because of discriminatory hiring and promotion practices;

(2) Defendant has discriminated against females in salary and compensation;

(3) Defendant has discriminated against females in the terms and conditions of their employment.

In the prayer for relief Plaintiff seeks a permanent injunction, a declaratory judgment, equitable relief, reinstatement, and attorneys' fees.

In response to Plaintiff's complaint the Defendant has moved to dismiss or strike certain portions of Plaintiff's complaint. In particular, Defendant claims that the Plaintiff's class allegations of across the board discrimination could not reasonably have been expected to have grown out of the Plaintiff's charge filed with the EEOC and that therefore the class allegations should be dismissed because the Court lacks subject matter jurisdiction over those claims. In addition, Defendant moves to have Plaintiff's allegations of jurisdiction under 28 U. S. C. §§ 2201, 2202 stricken on grounds that these statutes do not confer subject matter jurisdiction upon federal courts. Finally, Defendant moves to strike Plaintiff's prayer for compensatory damages under Title VII. Plaintiff has responded to the motion, and on February 9th, 1981 this Court conducted a hearing at which time counsel for both sides presented oral argument.

I.

The Jurisdictional Issues

It is the well settled law of this Circuit that the filing of a discrimination charge with the EEOC is the essential first step in the administration of Title VII. *See, e.g. Walker v. Jim Dandy,* Slip. Op. 4528 at 4350 (5th Cir. No. 78-2652, Mar. 13, 1981). In a series of three cases the Fifth Circuit has addressed the issue of the scope of subject matter jurisdiction vested in a court hearing a Title VII action in relation to the scope of the discrimination charge presented at the administrative level. *See Falcon v. General Telephone Co.,* 626 F.2d 369, 376-77 (5th Cir. 1980); *Gamble v. Birmingham Southern Railroad Co.,* 514 F.2d 678, 687-89 (5th Cir. 1975); *Sanchez v. Standard Brands, Inc.,* 431 F.2d 455 (5th Cir. 1970). In the instant case, Defendant argues that Plaintiff presented no class allegations to the EEOC at the administrative level, that the EEOC only examined the Plaintiff's individual allegations of discrimination in the course of their investigation, and that, therefore, this Court is without subject matter jurisdiction to hear the class claims. Defendant also contends that the scope of this Court's jurisdiction over Plaintiff's claims is limited to the three allegations of discrimination set forth in the charge filed by Plaintiff with the EEOC. In light of the fact that the Fifth Circuit has not addressed the first issue raised by Defendant, a brief excursion through the jurisprudence of *Sanchez, supra,* and its progeny cited above is necessary.

In *Sanchez,* the Plaintiff filed a charge of discrimination with the EEOC by filling out an EEOC form which stated,

> "My complaint was that my boss lady hit me at my rear and about a month before that I hurt my thumb and was out of work for seven days and the company didn't pay me. I hurt my thumb at work."

In a row of boxes representing various categories of discrimination she checked "SEX". After the then relevant ninety day period had expired for the bringing of a discrimination charge based on the incident of which Plaintiff complained, the Plaintiff executed an amended charge of discrimination which stated that "[my] supervisor seemed abrupt and most [sic] vengeful against Negroe and Mexican American women rather than Anglo women." In the amended charge she checked both "SEX" and "NATIONAL ORIGIN" as the types of discrimination involved. The Defendant moved to have the "NATIONAL ORIGIN" portion of the Plaintiff's complaint dismissed, and concluding that the complaint did in fact exceed the scope of the original charge, the district court dismissed the complaint. On appeal, the Fifth Circuit reversed the ruling, and remanded the case to the district court with instructions to hear the national origin claim. In so doing the *Sanchez* Court enunciated a standard to be utilized with respect to determining the proper scope of a Title VII complaint pursuant to the charge filed with the EEOC:

> In *King v. Georgia Power Co.*, N. D. Ga. 1968, 295 F. Supp. 943, Judge Smith held that the allegations in a judicial complaint filed pursuant to Title VII "may encompass any kind of discrimination like or related to the allegations contained in the charge and growing out of such allegation during the pendency of the case before the Commission." 295 F. Supp. at 947. In other words, the "scope" of EEOC investigation which can reasonably be expected to grow out of the charge of discrimination.

The *Sanchez* Court considered six factors in reaching its decision. First, the remedial and humanitarian underpinnings of Title VII mandate that the courts must be "extremely reluctant to allow procedural niceties to bar claims brought under the Act." Second, the Court found support in the Commission's relation back amendment, 29 C. F. R. § 1601.11(b), which provided an amended charge relates back to the date of the filing of the original charge if the amendment merely clarifies or amplifies the original charge or cures the technical defects or omissions. Third, the *Sanchez* Court concluded that the crucial element of a charge of discrimination is the factual statement contained therein, and not the legal conclusions that the charging party may draw from the facts as alleged. Fourth, the court concluded that Title VII, and its procedural framework were not designed "for the sophisticated or cognoscenti" and that accordingly the Act should be interpreted to accomplish its remedial purpose. Fifth, the Court concluded that the Charging Party's failure to attach the correct legal conclusion to the facts she alleged in her charge was a mere "technical defect." Finally, the *Sanchez* Court noted that if a more exacting rule were employed, an employer's incentive toward voluntary compliance would be lessened. Accordingly, the court held that nothing in the complaint was beyond the scope of the charge filed with the EEOC.

Five years later in *Gamble v. Birmingham Southern Railroad Co.*, 514 F.2d 678 (5th Cir. 1975), the court once again addressed the issue of the proper scope of a complaint in light of the charge filed with the EEOC. In *Gamble*, the Plaintiff's charge with the EEOC alleged that the Defendant was discriminating against blacks by its

failure to promote switchmen to the position of conductor. At trial the Plaintiffs also sought to adduce evidence that the Defendants discriminated against the Plaintiffs with respect to promotions from the conductor position to that of supervisor. The evidence showed that virtually all supervisors were chosen from the roster of conductors. The trial court found that the allegations concerning the supervisor position were outside the scope of the charge filed with the EEOC and accordingly, limited the scope of the trial to the conductor question. On appeal, the Fifth Circuit reversed this determination, finding that the supervisor complaint was like or related to conductor complaint and could reasonably be expected to grow out of the original charge filed with the EEOC.

In *Gamble* the court acknowledged that the facts before it were somewhat different than those presented in *Sanchez,* for the reason that it was undisputed that the EEOC had not investigated any charges relating to the supervisor level. Thus, it was said that the complaint exceeded the scope of not only the EEOC charge, but also the investigation. In addition, the Defendant argued that it had a right to conciliation with respect to the supervisor question. The Fifth Circuit rejected these contentions, however, and held that the district court should have considered the supervisor issue:

> ". . . we hold that the district court should have considered the switchmen's claim as to supervisory promotions. The question was 'like or related to' the original charge before the EEOC. The discrimination alleged is of the same type or character as that originally charged, and the same plaintiffs are involved. If blacks cannot be promoted to conductor,

then a fortiori they cannot be promoted to supervisor, and in fact have not been."

514 F.2d at 689.

The final chapter in this trilogy of cases is *Falcon v. General Telephone Company*, 626 F.2d 377 (5th Cir. 1980). In *Falcon*, the EEOC conducted an investigation of hiring as well as the promotion practices of the Defendant despite the fact that the charge filed with the EEOC referred only to the Defendant's promotion practices. The *Falcon* Court held that the hiring practices were within the proper scope of a judicial complaint, principally on the ground that "the civil action is much more intimately related to the EEOC investigation than the words of the charge that originally triggered investigation." 626 F.2d at 376 (quoting *Sanchez, supra* at 466). In addition, the court noted that the EEOC could reasonably expand the scope of their investigation beyond the scope of the charge after initial inquiries, and that to limit the EEOC's discretion in this area would not be in harmony with the remedial purposes of the Act. Finally, the Court noted the strong connection between hiring and promotion claims.

In the instant case the Defendant presents the following evidence in support of its motion to dismiss the class allegations as outside the proper scope of a judicial complaint:

(1) the formal charge filed with the EEOC on behalf of the Plaintiff which enumerates only the individual claims she asserts in this action;

(2) an affidavit of counsel for the Defendant stating that he represented the Defendant in the administrative process and that at no time did the

EEOC advise him that it intended to conduct, or was conducting an investigation of any allegations of class discrimination in connection with the Plaintiffs charge of discrimination; further, at no time did the EEOC request conciliation or settlement of the Plaintiffs on any basis other than as to the individual allegations;

(3) an affidavit of the Director of the Dallas District Office of the EEOC stating during the administrative investigation into Ms. Fellows' charge the EEOC did not identify the case as one which required class investigation, and neither did it conduct a class investigation of the Defendant; further the case was never assigned to the EEOC's class investigation unit and the investigation was confined solely to Ms. Fellows' individual allegations of unlawful discrimination;

(4) a certified copy of the administrative record as developed by the EEOC which makes no reference to any class allegations or class investigation on the part of the EEOC.

Thus, it is clear that the issue before the Court is cast in terms of an EEOC charge devoid of any class allegations, and of which the EEOC made no class investigation.

The issue then is whether this showing is sufficient to jurisdictionally bar a class claim stemming from the Plaintiff's charge filed with the EEOC.

In support of its motion Defendant cites *Macon v. Bailer*, 451 F.Supp. 140 (E. D. Va. 1978) and *Stubbs v.*

Bendix Field Engineering Corp., 21 FEP Cases 804 (D. Md. 1977). I am of the opinion that the cases are not in point. In *Stubbs*, the court dismissed certain (but not all) class allegations on grounds that the alleged forms of discrimination in the judicial complaint were clearly unrelated to the forms of discrimination alleged by the Plaintiff in the charge with the EEOC. Nothing in the opinion supports the proposition advanced by Defendant that where there is no charge of class discrimination with the EEOC, and no class investigation, the judicial complaint is limited to the harms suffered by the individual Plaintiff. Likewise, the court in *Macon* found that "[t]he discrimination suffered by the class which Plaintiff seeks to represent is far different from that set forth in the administrative charge." 451 F.Supp. at 141.

Defendant also cites *EEOC v. Mallinckrodt*, 22 FEP Cases 311 (E. D. Mo. 1980). The rationale of the decision in *Mallinckrodt* is dispositive of the instant motion. In that case, after an investigation of the original charge filed with the EEOC, the EEOC "was unable to identify any alleged unlawful employment practice except that which involved the charging party." *Id.* at 314. To allow the EEOC to proceed with a class suit would "be dangerously akin to a 'witch hunt'" and the court granted the Defendant's motion for summary judgment as to the class allegations. Of importance to the case at bar is the finding of the court that the EEOC limited its investigation to claims of the charging party. This is, of course, precisely the same situation before this Court. The EEOC conducted its investigation and there is simply nothing in the record indicating that the investigation uncovered any unlawful employment practice other than that which the

charging party alleged. The charging party made no such allegations with the EEOC. To permit class allegations to remain in this case would be to sanction the "witch hunt" condemned in *Mallinckrodt*. There must be some indication of class related unlawful employment practices in the administrative record prior to the institution of a class suit in federal court. Otherwise, employers will be called on to defend class suits for which there is simply no factual basis prior to the filing of the suit. Further, there is no opportunity for conciliation of such allegations prior to the filing of the suit. To sanction such a practice would distort the purpose of the statutory framework of Title VII. A charging party with absolutely no knowledge of any facts relating to other instances of discrimination files its charge with the EEOC, the EEOC conducts its investigation into the charge and unveils absolutely no instances of discrimination other than those alleged by the charging party, and yet, the employer is called upon to defend a Title VII class suit.

It goes without saying that class suits are burdensome to both the Courts and the employers in sheer terms of the amount of effort expended by each. Prior to any determination as to liability the Court must conduct a class certification hearing, and make findings as to the proper scope of the class. Before this process is invoked I am of the opinion that a Plaintiff must make a showing of factual grounds supporting class allegations.

In the case at bar Plaintiff focuses upon the Defendant's unresponsive attitude towards EEOC requests for information relative to class allegations. I note, however, that the Defendant at the administrative level merely asserted that this information was beyond the scope of the

charge, but that if necessary the information would be provided. The EEOC never pursued that information, never having felt the need to conduct a class investigation. Thus, I fail to see the significance of this contention.

In sum I have concluded that the class allegations must be stricken from Plaintiff's complaint on jurisdictional grounds. In opposition to Defendant's motion, Plaintiff has cited the Court to section 2.1(e) of the EEOC Compliance Manual which states as follows:

> (1) The Commission will ordinarily limit its investigation to the allegation(s) of the charging party;
>
> (2) The decision to limit the scope of investigations is based on the necessity of allocating limited Commission resources;
>
> (3) The fact that a narrow investigation was conducted by the Commission does not reflect the scope of the Commission's investigation which might reasonably have grown out of a charge and therefore the decision to limit investigation is not intended to, and should not affect the charging party's right to seek relief in a private suit for all the discriminatory practices which might have been uncovered if the Commission had sufficient resources to investigate all charges more extensively; . . .

Aside from the fact that the EEOC's pronouncements above are clearly contrary to the law of this Circuit, see *Falcon* at 376 (the civil action is much more intimately related to the investigation than the words of the charge), it is apparent that this passage is not applicable to the class issue presented in this case. Further, the affidavit of Lorenzo Ramirez, which is uncontroverted, indicates that the EEOC does have a procedure for identifying those charges which require class investigations, that there is a

class investigatory unit, and that the EEOC never identified Ms. Fellows' charge as one requiring class investigation. Hence, it is clear that during the administrative level the possibility of classwide unlawful employment practices was simply never considered. Under these circumstances, I believe that the class claims are jurisdictionally barred.

II.

Compensatory Damages Under Title VII.

Defendant has also moved to have Plaintiff's prayer for compensatory damages under Title VII stricken. Plaintiff has not responded to this particular contention, but in any event it is clear that the relief authorized by the statute in question is purely equitable. 42 U. S. C. § 2000e-5 (g). *See Johnson v. Georgia Highway Express, Inc.*, 417 F.2d 1122 (5th Cir. 1969). Therefore, Defendant's motion to strike Plaintiff's prayer for compensatory damages is well taken.

III.

Jurisdiction Under 28 U. S. C. §§ 2201, 2202

It is well established that the declaratory judgment provisions of the judicial code, 28 U. S. C. §§ 2201, 2202 are not independent sources of federal court subject matter jurisdiction, and therefore Defendant's motion to strike Plaintiff's jurisdictional allegations pursuant to these statutes is granted.

Conclusions

In sum I have concluded that Plaintiff's class allegations should be stricken, that Plaintiff's prayer for compensatory damages should be stricken, and that the asser-

tion of the declaratory judgment provisions of the judicial code as independent sources of federal court subject matter jurisdiction is improper.

So ORDERED this 16th day of June, 1981.

/s/ Robert W. Porter

United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 82-1125

LAURA FELLOWS,
Plaintiff-Appellant,

vs.

UNIVERSAL RESTAURANTS, INC.,
Defendant-Appellee.

Appeal From The United States District Court
For The Northern District of Texas

D. C. Docket No.
CA3-80-1328F

Entered March 28, 1983

Before WISDOM, RUBIN and TATE, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the order of the District Court appealed from in this cause be, and the same is hereby, reversed and that this cause be and the same is hereby remanded to the said District Court for further proceedings in accordance with the opinion of this Court;

IT IS FURTHER ORDERED that defendant-appellee pay to plaintiff-appellant the costs on appeal to be taxed by the Clerk of this Court.

MARCH 28, 1983

ISSUED AS MANDATE: April 19, 1983